91-806

(1)

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

WAYNE CAMPIERE AND KEVIN FRANCOIS,

Petitioners,

vs.

LOUISIANA POWER & LIGHT CO.,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

On summary judgment, in this state action case brought on behalf of subcontractor employees who were permanently denied access to their jobs at a nuclear power plant owned by Louisiana Power and Light and governed by a security plan implemented and monitored by the Nuclear Regulatory Commission, did the Fifth Circuit improperly impose a more strenuous burden of proof on plaintiffs than required by the Supreme Court, wherein plaintiff were obligated to prove direct and intimate involvement of officials of the Nuclear Regulatory Commission in Louisiana Power and Light's decision to deny access to the specific employees for alleged fitness for duty violations under the security plan, as opposed to, allowing plaintiffs to satisfy their burden in accordance with the broader standard recognized by the Supreme Court that the general conduct of the Nuclear Regulatory Commission in encouraging or coercing Louisiana Power and Light's ultimate decision is sufficient to fairly attribute that decision to the state action?

PARTIES

The names of all parties to the proceeding in the court whose judgment is sought to be reviewed here appear in the caption of the case.

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No.

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit reported as *Wayne Campiere and Kevin Francois v Louisiana Power and Light Co.* is not rendered as a written opinion in accordance with Local Rule 47.5 and appears in Appendix A. The opinion and order of the United States District Court for the Eastern District of Louisiana is officially reported as *Wayne Campiere and Kevin Francois v Louisiana Power and Light Co. and The Wackenhut Corp.* and appears in Appendix B.

JURISDICTION

The opinion of the Fifth Circuit Court of Appeals was rendered on July 15, 1991. In accordance with Rules 13.1 and 13.4 of this Court, this petition is filed within 90 days of the date of rendering of the opinion of the Fifth Circuit. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254 (1988) because the opinion of the Fifth Circuit decides an important question of federal constitutional law in a manner inconsistent with precedents of this Court.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

A. Constitutional Provisions

The "Due Process" clause of the 14th Amendment to the United States Constitution, U.S. Const amend. XIV, section 1, provides:

> All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

B. Statutory Provisions

In its entirety, 42 U.S.C. Section 1983 (1988) provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the

deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceedings for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

STATEMENT OF THE CASE

The important issue raised by this case is whether the action of a concededly private enterprise whose operations are licensed and regulated by the federal government through the Nuclear Regulatory Commission (hereinafter "NRC"), and whose security policy including fitness for duty of personnel is continuously supervised by the NRC because of the degree of risk associated with a nuclear generating facility, is "state action" for due process purposes when that organization deprives a person of constitutionally recognized property interest in the form of continued employment due to alleged violations of the security policy.

Louisiana Power and Light Co. (hereafter "LP&L") is clearly a state actor when making security decisions regarding the quality of personnel who may be granted unescorted access status at the Waterford 3 nuclear power plant because of the NRC's extensive direction, encouragement, and coercion in the security area, which includes the "fitness for duty" contractor employees.

A. Statement of Facts

Waterford 3 is a nuclear generating plant in Taft, Louisiana, owned and operated by LP&L, but extensively regulated and actively supervised by the federal government through the NRC, particularly in the area of security.

The NRC requires that all nuclear power plants be thoroughly secured; therefore, as part of Waterford 3's extensive security plan, LP&L contracts with The Wackenhut Corporation (hereinafter "TWC") to provide security guards to supplement its own force. LP&L's contract with TWC provides LP&L with

the authority to have any TWC employee working at Waterford 3 removed from the plant "for cause", but does not provide any kind of procedural hearing for the removed employee.

LP&L also hires various insulation contractors to do insulation work at Waterford 3. These contractors in turn hire their employees from International Association of Heat and Frost Insulators and Asbestos Workers, Local No. 53 ("Local #53"). LP&L'S contract with these sub-contractors specifically grants LP&L the power to deny access ot the contractor's employees, but does not provide any kind of procedural hearing for the banned employee.

In 1984, Wayne Campiere worked for a subcontractor, B&B Inc., sewing blankets of insulation. During a voluntary search of Campiere's pockets at Waterford 3, LP&L security guards found what they characterized as a "roach clip," a device LP&L opined to be drug paraphernalia. The clip was tested by LP&L for traces of drugs and found to be free of any drug related material. Campiere has never been accused of drug use on or off the job. The clip was actually a device that Campiere and his fellow employees used to hold insulation blankets together while sewing. Campiere was denied access to the nuclear power plant and as a result, terminated by his employer. Campiere was not provided a hearing.

In September, 1989, Campiere was employed by ANCO Insulations, Inc. ("ANCO") and returned to Waterford 3 to perform his job. However, after beginning work, he was instructed by ANCO to leave the plant because LP&L revoked his unescorted access. Although Campiere was not immediately given a reason for his removal from Waterford 3, his business agent subsequently learned that LP&L had Campiere removed solely because of Campiere's previous expulsion in 1984. Again, Campiere was not provided a hearing.

In 1983, Francois was working directly for the security contractor, TWC. During the last half-hour of his second continuous eight-hour shift, he was allegedly observed asleep. Because of this incident, LP&L revoked Francois' unescorted access privilege

and as a result, TWC terminated Francois' employment at Waterford 3. Francois was not provided a hearing.

In 1989, Francois completed a four year apprenticeship program and became an insulator through Local #53. In August, 1989, Francois was informed that there was work available for him through ANCO at the Waterford 3 Nuclear Power Plant. Francois successfully completed two days of testing, but upon returning for the third testing day, was refused the necessary entrance badge from the security guard. Although no explanation was given to Francois at that time for LP&L's refusal to allow him into the testing area, Francois' business agent was later advised that the refusal to admit Francois into Waterford 3 was due solely to LP&L's revocation of Francois' unescorted access status in 1983. Again, Francois was not provided a hearing.

LP&L conceded in the uncontested facts portion of the pretrial order that the NRC was responsible for establishing and monitoring the security plan which included the denial of access provisions utilized to ban Campiere and Francois. Additionally, during the time that LP&L initially banned Campiere and Francois from the Waterford 3 Nuclear Power Plant the NRC issued an informal fitness for duty policy and encouraged owners of nuclear power plants such as LP&L to invoke strict fitness for duty standards of personnel at the plant including "fatigue" and "influence of drugs" in order to avoid formal regulation. By 1989 when the plaintiffs' denial of access was made permanent this policy became formal.

B. Prior Proceedings

Campiere and Francois commenced this action against The Wackenhut Corporation and Louisiana Power & Light in the United States District Court for the Eastern District of Louisiana alleging that their property and liberty rights had been deprived without due process of law by virtue of LP&L arbitrarily depriving the plaintiffs unescorted access into the Waterford 3 Nuclear Power Plant. The suit was dismissed against The Wackenhut Corporation on Plantiffs' motion. The District Court granted LP&L Motion for Summary Judgment on October 30,

1990 on the grounds that LP&L was not a state actor. Plaintiffs filed an appeal with the United States Court of Appeals for the Fifth Circuit, seeking reversal of the district court's granting of summary judgment. On July 15, 1991, the Fifth Circuit affirmed the district court's judgment of dismissal finding insufficient evidence of any state action.

THE FIFTH CIRCUIT'S OPINION THAT THE CHALLENGED ACTION WAS NOT ATTRIBUTABLE TO THE STATE CONFLICTS WITH THE PRECEDENTS OF THIS COURT

In *Blum v Yarestsky*, 102 S.Ct at 2785, this Court set out three types of state action claims. First, those cases in which the defendant, a private party, is delegated sovereign power; second, cases in which the challenged conduct consists of enforcement of state laws or regulations by state officials who are themselves parties in the lawsuit; and, third, cases in which the challenged conduct may be treated as action of the state.

In the case at bar, as in *Blum*, the third category of state action is applicable. LP&L is clearly a state actor when making decisions regarding the quality of personnel who may be granted unescorted access status at the Waterford 3 nuclear power plant because of the NRC's extensive direction, encouragement and coercion in this area.

The complaining party must show "that there is a sufficiently close nexus between the State and the challenged action of the regulated entity so that the action of the latter may be fairly treated as that of the State itself." *Jackson v Metropolitan Edison Co.* 419 U.S. at 350.

In *Blum*, this Court held that the purpose of the close nexus requirement was to assure that constitutional standards were invoked only where it can be said that the State is responsible for the specific conduct of which the plaintiff complains. Also, *Lugar v Edmondson Oil Co.*, 457 U.S. 922, 102 S.Ct. 2744, 73 L Ed.2d 482.

Therefore, the state action necessary to invoke constitutional protection under *Blum*, was left to a case by case inquiry in order to determine whether the state was responsible for the ultimate challenged action. The state could be found responsible under this inquiry if the state encouraged and coerced the private party's decision. However, neither mere acquiescence, nor extensive regulation alone would be enough. *Jackson*, 419 U.S. at 350, 95 S.Ct. at 453.

LP&L conceded in the "uncontested facts" portion of the Pretrial Order filed in this case that the NRC was responsible for establishing the security plan at Waterford 3 to insure safe operations of the nuclear plant and that this security plan entitle LP&L to deny contractor employees such as Campiere and Francois unescorted access to controlled areas in the nuclear plant. (Pretrial Order pg. 13, para 14 and 15). In their "statement of facts", LP&L admitted that LP&L is licensed by the Nuclear Regulatory Commission for operation of Waterford 3, that it is obligated to provide a security plan, including security forces in accordance with federal regulations, that it is periodically audited regarding the plan and that it is required to maintain ongoing documentation of the plan for the NRC.

Clearly, these admissions were sufficient to fairly attribute LP&L's decisions to deny Campiere and Francois access to the nuclear power plant to the NRC since they must be attributable to securing the plant in accordance with the NRC implemented and audited security plan. At a minimum these pretrial admissions of LP&L in encouraging and directing the security plan shifted the burden to LP&L to explain away the NRC involvement and prove its detachment from the decisions to permanently bar access to Campiere and Francois. See, *Celotex Corporation v Catrett*, 106 S.Ct. 2548 (1986).

However, there is further evidence in the Federal Register that in the early 1980's, the NRC became increasingly concerned regarding the fitness of personnel to whom the nuclear industry was granting unescorted access into its nuclear facilities. The NRC's policy concerning the quality of the work force at nuclear

generating facilities, known as the "Fitness for Duty" program, was proposed in 1982. It was "designed to assure that personnel with unescorted access to protected areas are not under the influence of drugs or alcohol or otherwise unfit for duty." 47 Fed. Reg. 33980 (1982) (proposed August 5, 1982). The NRC intended the phrase "otherwise unfit for duty" as it appeared in its policy to require "consideration of the effects when determining an individual fitness for duty such as *fatigue*, stress, illness and temporary physical impairments." *Id.* at 33980 (emphasis added). Although the proposed policy was not officially adopted until June, 1989, it was the subject of discussion and debate in the nuclear industry throughout the 1980's. The NRC issued a statement on August 4, 1986, stating that "[d]ue to the initiatives taken by the nuclear industry, the Commission [NRC] has decided to defer implementation of the rule subject to successful implementation of fitness for duty programs by the industry as described in the policy statement.... The commission will exercise this deference as long as the industry programs produce the desired results." 51 Fed. Reg. 27921 (1986).

Therefore, beginning in 1982, the NRC made it absolutely clear that only "fit" individuals should be granted unescorted access status. The NRC's proposed "Fitness for Duty" program threatened the nuclear industry to do everything possible to deny unescorted access to personnel who were influenced by drugs and alcohol or otherwise unfit for duty in order to avoid mandatory regulation. Therefore, in applying the "responsible" test, plaintiffs contended that the NRC's threatened enforcement of a "Fitness for Duty" program so directed, encouraged and coerced LP&L's action in imposing the wrongful and unduly harsh penalties on Campiere and Francois for their alleged breaches of the fitness for duty policy as to fairly attribute those challenged actions to the NRC.

LP&L sought to escape responsibility under the close nexus test by asserting in their "statement of facts" portion of the pretrial order that, "The NRC regulations did not, however, mandate the particular decision made with respect to Campiere and Francois, and no federal officials were involved in these

decisions." (Pretrial Order pg. 10). Here lies the essence of the dispute. The Trial Court and the Fifth Circuit apparently agreed with LP&L that the plaintiff bore the burden of proving NRC involvement specifically through actions of *federal officials in the particular decisions made with respect to Campiere and Francois.* Whereas, plaintiffs contend that proof of NRC encouragement and coercion of LP&L's conduct in the area of fitness for duty by directing and auditing the security plan and threatening to impose a formal fitness for duty policy, resulted in LP&L decisions to ban plaintiffs, and was sufficient to defeat summary judgment. Instead of inquiring into who was responsible for the challenged action under the broader test in *Blum*, the Fifth Circuit following its own rationale in *Roberts v Louisiana Downs*, 742 F.2d. 221 (1984) improperly redefined plaintiff's burden of proving close nexus by replacing the term "responsible" with the more limiting phrase, "intimate involvement." *Roberts*, 742 F. 2d at 224. In applying its own intimate involvement test, the Fifth Circuit has solely focused on the absence of participation of NRC officials in the ultimate decision to discipline Campiere and Francois and disregarded the NRC's prior actions which led LP&L to implement the challenged action. By adopting the intimate involvement language, the Fifth Circuit has misread the broader scope of the *Blum* close nexus test and imposed an unwarranted burden on the plaintiff in overcoming motions for summary judgment in the state action area.

In *Mathis v Pacific Gas and Electric Co.*, 891 F.2d 1429 (9th Cir. 1989), the Ninth Circuit, reached a result diametrically opposed to the Fifth Circuit in this case on almost identical facts, regarding the close nexus of the NRC to fitness for duty decisions in a nuclear power plant. Mathis claimed that his denial of access by PG&E was directed or encouraged by the NRC pursuant to its informal fitness for duty program. The Court held, "If Mathis can prove his allegations that in 1985 the NRC was maintaining an informal policy equivalent to the policy it published in 1986, he may be able to establish that PG&E's action can be ascribed to a governmental decision." *Mathis*, 891 F.2d at 1434. The Ninth Circuit reversed the order of the district court dismissing Mathis' claim for lack of subject matter jurisdiction.

Summary judgments considerations are not so different from subject matter jurisdiction as to justify a distinction in these cases. See, *Keating v Shell Chemical Co.*, 610 F. 2d 328 (5th Cir. 1980) and *Celotex Corp. v Catrett*, 106 S.Ct 2548 (1986).

The area of state action doctrine is at best a muddled one. *See, generally*, Black, *The Supreme Court, 1966 Term-Forward: "State Action," Equal Protection, and California's Proposition 14*, 81 Harv.L.Rev. 69, (1967); Friendly, *The Public-Private Penumbra – Fourteen Years Later*, 130 U.Pa.L.Rev. 1289, 1290 (1982) (stating that Professor Black's characterization of state action doctrine appears to be "even more apt today"); Phillips, *The Inevitable Incoherence of Modern State Action Doctrine*, 228 St. Louis U.L.J. 683 (1984).

The Fifth Circuit's restrictive interpretation of the plaintiff's burden in satisfying the close nexus test adds further confusion to the rule of law in this area and should be overruled.

CONCLUSION

A writ of certiorari should be issued to review the opinion of the United States Court of Appeals for the Fifth Circuit. The petition identifies conflicts between the Fifth Circuit and the Ninth Circuit, and the Fifth Circuit and this Court. Further, there is no clear test to follow concerning state action. For these reasons, the petition should be granted.

APPENDIX

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF LOUISIANA

WAYNE CAMPIERE AND KEVIN FRANCOIS	* CIVIL ACTION
	* NO. 89-5368
VERSUS	*
	* SECTION: "J"
LOUISIANA POWER & LIGHT CO. AND THE WACKENHUT CORPORATION	* MAGISTRATE: 5

* *

PRE-TRIAL ORDER

I.

PRE-TRIAL CONFERENCE DATE

A pre-trial conference will be held before the Honorable United States District Judge, Patrick E. Carr, on Monday, September 10, 1998 at 8:00 a.m.

II.

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III.

DESCRIPTION OF PARTIES

Plaintiffs are Wayne Campiere and Kevin Francois.

Defendants are The Wackenhut Corporation and Louisiana Power and Light Company.

IV.

JURISDICTION

Jurisdiction is asserted for damages and injunctive relief under 42 U.S.C. § 1983 for the deprivation of plaintiffs' constitutional rights to due process of law. Jurisdiction is asserted for costs and attorney's fees pursuant to 43 U.S.C. § 1988. Jurisdiction is asserted for a declaratory judgment pursuant to 28 U.S.C. § 2201.

V.

PENDING OR CONTEMPLATED MOTIONS

The Wackenhut Corporation will file a Motion to Compel more responsive Answers to Interrogatories. Further, The Wackenhut Corporation anticipates filing a Motion to Dismiss and/or Motion for Summary Judgment as there is no factual or legal basis for plaintiffs' to have instituted this suit against The Wackenhut Corporation.

Louisiana Power and Light Company plans to file a Motion to Dismiss and/or Motion for Summary Judgment.

Plaintiffs may file motions in limine.

VI.

STATEMENT OF MATERIAL FACTS

Plaintiffs, Wayne Campiere and Kevin Francois:

LP&L's Waterford 3 Nuclear Power Plant facility is regulated and inspected by the Nuclear Regulatory Commission (NRC) and is operated according to parameters set by the NRC in 10 C.F.R. 73.50.

Unescorted access privileges to the facility and revocation of said privileges are also governed by the NRC regulations (10 C.F.R. 73.50). This case involves the revocation of plaintiffs unescorted access privileges, without cause and without due process protection, thereby, depriving plaintiffs of their continued employment with subcontractors working at the Waterford 3 site. 10 C.F.R. 73.50 at p. 272 establishes that: licensee shall "establish an authorization system to limit unescorted access to vital areas during non-emergency conditions to individuals who require access in order to perform their duty" and

> Revoke in case of an individual's involuntary termination *for cause*, the individual's unescorted facility access and retrieve his or her identification badge and

other entry devices, as applicable prior or simultaneously with notifying this individual of his or her termination.

LP&L's Waterford 3 Nuclear Power facility is also monitored by the Louisiana Department of Environmental Quality. The Wackenhut Corporation was under contract to provide LP&L Waterford 3 facility with security personnel. The Wackenhut Corporation enforced security including the control of access at the Waterford 3 facility.

Plaintiff, Kevin Francois, was employed as a security guard by Wachenhut Corporation at LP&L's Waterford 3 Nuclear Plant facility.

On June 20, 1983, Kevin Francois was found sleeping during the last half hour of a sixteen hour shift. As a result, he was denied unescorted access to Waterford III. However, he was not notified that the denial of access would be permanent. Francois was then assigned by Wackenhut to work as a security guard at Tenneco Oil Refinery. He later resigned from Wackenhut and became a member of the International Association of Heat and Frost Insulation and Asbestos Workers, Local No. 53 (Local 53). In August, 1989 Francois was assigned by Local 53 as an insulator to work for ANCO Insulations at the LP&L Waterford 3 Nuclear Plant. Despite the fact that Francois met all of LP&L's screening requirements and that he received a recommendation from Wackenhut, he was advised for the first time by defendant, LP&L, that he was permanently denied unescorted access to Waterford III.

As a direct result of the revocation of his security clearance, plaintiff, Kevin Francois, was terminated by his employer ANCO.

Plaintiff, Wayne Campiere, also a Local 53 member, was assigned as an insulator to work for B & B Insulations at LP&L's Waterford 3 facility in 1984.

On August 31, 1984, agents of LP&L conducted a contraband search and found a key type "roach clip" on Wayne Campiere's

key chain. Such clips were routinely used by insulators to hold together insulating blankets while they were being sewn. The clip was tested by LP&L on September 21, 1984 and was found to be free of any traces of illicit drugs. However, as a result of the search, Wayne Campiere was denied unescorted access by LP&L to Waterford 3 and was terminated by B & B Insulations. He was not notified that he would be permanently barred from work at the facility.

In September, 1989, plaintiff, Wayne Campiere, was assigned by Local 53 to work for ANCO Insulations at Waterford 3. He was successfully screened, qualified for the job and given a urine test that was found to be free of any drugs. However, shortly thereafter LP&L notified him that his unescorted access privileges had been revoked. As a result of his inability to return to Waterford 3, he was terminated by ANCO Insulations.

Plaintiffs were not informed in 1989 of the reason for their denial of access nor were they afforded a hearing or an opportunity to appeal LP&L's decision.

As a result of LP&L's arbitrary decision, and refusal to afford plaintiffs due process, plaintiffs suffered loss of employment, loss of income, loss of business reputation and incurred attorney's fees.

The Wackenhut Corporation:

The Wackenhut Corporation is a privately owned corporation which provides security services at Louisiana Power and Light's Waterford 3 Nuclear Power Plant. The security services are provided in accordance with the contractual agreement between Wackenhut and LP&L. Wackenhut neither provides security clearance nor revokes security clearance. This determination is made by LP&L.

In regards to Wayne Campiere, Wackenhut was in no way responsible in whole or in part for revoking Mr. Campiere's security clearance in August, 1984 or September, 1989.

Regarding Kevin Francois, he was working as a security officer for Wackenhut Corporation in June, 1983 at Waterford 3. On or about June 20, 1983 it was learned that Mr. Francois was sleeping at his post. Wackenhut terminated Mr. Francois from employment at Waterford 3 Nuclear Power Plant.

Wackenhut was in no way responsible in whole or in part for failing to provide security clearance or revoking security clearance to Kevin Francois in August, 1989.

Louisiana Power and Light Company:

This action arises out of Wayne Campiere's and Kevin Francois' denial of unescorted access in 1989 to Waterford 3, a nuclear generating facility owned and operated by Louisiana Power and Light Company (LP&L). To gain unescorted access to the nuclear power plant, contractors' employees undergo screening and testing at Waterford 3. After successful completion of the testing and screening, a contractor's employee receives an entry badge and other entry devices, which permit unescorted access to the nuclear plant. In August and September, 1989, Campiere and Francois were denied unescorted access because they had previously been denied unescorted access, a standard rule automatically applied by LP&L in such instances.

In 1989, both Campiere and Francois were mechanic insulators periodically employed by various contractors for specific jobs of limited duration at various sites. Both were members of Local 53 of the International Association of Heat and Frost Insulators and Asbestos Workers (Local 53). As Local 53 members, Campiere and Francois obtained employment with contractors through Local 53's hiring hall by signing the "out of work" book. At the time of their denial of unescorted access, neither Campiere nor Francois was or had ever been an LP&L employee.

In August, 1989, at the direction of Local 53, Francois went to Waterford 3 for pre-screening and testing in expectation of temporarily working there for ANCO Insulations, Inc. (ANCO). After two days of testing, he was denied unescorted access

automatically because it was determined that he had previously been denied unescorted access in 1983. ANCO, which was performing work at Waterford 3, never employed Francois at Waterford 3 in 1989. Approximately one date after this incident, Francois was employed by Eagle Insulations as a mechanic insulator at another site.

Shortly thereafter, in September, 1989, at the direction of Local 53, Campiere went to Waterford 3, underwent prescreening and testing, and was hired by ANCO for a temporary job as a mechanic insulator at Waterford 3. After working one hour at the site, Campiere was denied unescorted access automatically because it was discovered that he had previously been denied access in 1984. Subsequent to his denial of access, ANCO terminated Campiere's employment for the ANCO project at Waterford 3. After this incident, Campiere was employed by ANCO at other sites.

In 1989, Local 53 and/or its International had a collective bargaining agreement with ANCO. LP&L was not a party to that contract. ANCO, in turn, had a contract with LP&L to perform insulation work at Waterford 3. The ANCO LP&L contract provided that ANCO had direction and control over its employees.

After the 1989 incident, Campiere reported his denial of unescorted access to Jimmy Galloway, his Business Manager at Local 53, who initiated grievance proceedings against ANCO. The national union office determined that the evidence was insufficient to make a ruling and permitted the parties to proceed to arbitration. The parties were about to do so when Campiere and ANCO settled their differences. ANCO paid Campiere $2,000 and agreed not to give Campiere negative references.

The 1989 denials of unescorted access were based on prior denials of access. In 1983, Francois was employed as a security guard by The Wackenhut Corporation and was assigned to Waterford 3. On June 23, 1983, while on duty at the Central Alarm Station, Francois fell asleep and was observed by an

LP&L employee, who reported the incident. Francois' act violated established work rules. Francois was then denied access to Waterford 3 because he was deemed by LP&L to be untrustworthy and unreliable. Wackenhut terminated his employment at Waterford 3. Shortly thereafter, Francois was either retained by Wackenhut or Wackenhut re-employed Francois at the Tenneco Refinery, where he worked until he resigned in 1984.

In 1984, Campiere was employed by B & B Insulation of Louisiana, Inc., which was doing insulation work at Waterford 3. On August 31, 1984, in the course of a routine contraband search of contractors' employees on the job site at Waterford 3, Security Department personnel found a "roach clip" in Campiere's possession. LP&L personnel considered this item to be drug paraphernalia, prohibited by company rules. In the same contraband search, another contractors' employee was found to possess a roach clip identical to Campiere's, which was found to be contaminated with traces of marijuana. Along with other contractors' employees, Campiere was escorted from the site and denied unescorted access to Waterford 3. Campiere, through Local 53, filed a grievance proceeding, but the dispute was settled.

LP&L conducted no hearings related to the 1983, 1984 or 1989 denials of access regarding either Campiere or Francois because it was not LP&L policy to conduct such hearings in these circumstances.

Waterford 3 is licensed by the Nuclear Regulatory Commission and is obligated to provide a security plan, including security forces, in accordance with federal regulations. LP&L develops its own physical security plan and the NRC periodically audits this plan and also requires documentation. The NRC regulations did not, however, mandate the particular decisions made with respect to Campiere and Francois, and no federal officials were involved in these decisions.

Waterford 3 is monitored by the Louisiana Department of Environmental Quality, but that monitoring is unrelated to the particular decisions that were made with respect to Campiere

and Francois. No state official or state agency was involved in these decisions.

Security services at Waterford 3 are provided by The Wackenhut Corporation, which had a contract with LP&L for such services. However, LP&L, as owner of Waterford 3, made decisions about unescorted access to the facility, and in 1989, applied a standing LP&L policy to deny unescorted access to anyone, including Campiere and Francois, who had previously been denied unescorted access to the plant.

VII.

UNCONTESTED MATERIAL FACTS

1. Wayne Campiere was denied access to Waterford 3 in 1984 because he was found in possession of a device described as a "roach clip", which was considered by LP&L to be drug paraphernalia.

2. The "roach clip" device found in the possession of Wayne Campiere in 1984 was tested for contamination of illegal drugs and was found to be free of any such contamination; however, an identical roach clip in possession of another contractor's employee was tested at the same time and found to be contaminated with marijuana.

3. Wayne Campiere was never found in possession of alcohol or any other illicit drugs while on the premises of Waterford 3.

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 90-3860

WAYNE CAMPIERE and KEVIN FRANCOIS,

Plaintiffs-Appellants,

versus

LOUISIANA POWER & LIGHT CO.,

Defendant-Appellee.

Appeal from the United States District Court
for the Eastern District of Louisiana
(CA 89-5368 J)

(July 15, 1991)

Before REAVLEY, POLITZ and JOLLY, Circuit Judges.

PER CURIAM:*

This matter is before the court on appeal of the summary judgment dismissal of complainants' Bivens claims against Louisiana Power & Light Company. Having considered the briefs and oral arguments of counsel in light of the pertinent parts of the record, and being persuaded that there is insufficient evidence of a connexity between the United States government and the Louisiana Power & Light Company actions complained of to constitute the private company as a federal actor, the judgment of dismissal must be and is AFFIRMED.

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* Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the court has determined that this opinion should not be published.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

WAYNE CAMPIERE AND KEVIN FRANCOIS	CIVIL ACTION
VERSUS	NO. 89-5368
LOUISIANA POWER & LIGHT CO. AND THE WACKENHUT CORPORATION	SECTION "J"

JUDGMENT

Pursuant to the Courts Minute Entry of October 29, 1990,

The Court, considering the pleadings, memoranda, and supporting affidavits, and concluding that there is no genuine issue as to any material fact and that, pursuant to Rule 56, Fed. R. Civ. P., defendant is entitled to judgment as a matter of law; IT IS HEREBY ORDERED, ADJUDGED AND DECREED that there be judgment in favor of defendants, Louisiana Power and Light, the Wackenhut Corporation having already been dismissed from this suit, and against the plaintiffs, dismissing plaintiffs' claims at their costs.

New Orleans, Louisiana, this 29th day of October, 1990.

/s/Patrick E. Cou

UNITED STATES DISTRICT JUDGE